



# Ohio Legislative Service Commission

## Final Analysis

Samuel K. Benham

### Am. Sub. S.B. 2

129th General Assembly

(As Passed by the General Assembly)

**Sens.** Hughes, Faber, Beagle, Daniels, Gillmor, Hite, Jones, Jordan, Bacon, Oelslager, Patton, Schaffer, Seitz, Stewart, Wagoner, Widener, Wilson, LaRose, Cates, Manning, Obhof

**Reps.** Baker, Buchy, Anielski, Barnes, Dovilla, Driehaus, Gonzales, Grossman, Henne, Kozlowski, Landis, Newbold, Rosenberger, Thompson, R. Adams, Balderson, Blair, Blessing, Boose, Brenner, Bubp, Butler, Carey, Coley, Combs, Derickson, Duffey, Gardner, Garland, Goodwin, Hackett, C. Hagan, Hall, Hayes, Hottinger, Huffman, Johnson, Lundy, Martin, McClain, McGregor, Mecklenborg, Milkovich, O'Brien, Peterson, Pillich, Roegner, Ruhl, Schuring, Sears, Slaby, Stautberg, Szollosi, Uecker, Wachtmann, Young, Batchelder

**Effective date:** June 7, 2011; certain provisions effective January 1, 2012

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## ACT SUMMARY

- Establishes a new rule review process to assess whether proposed or existing administrative rules of certain state agencies have an adverse impact on businesses and to mitigate that impact.
- Eliminates the formerly existing small business rule review process.
- Creates the Common Sense Initiative Office (CSIO) within the Office of the Governor to evaluate rules that may have an adverse impact on businesses.
- Creates the Small Business Advisory Council composed of small business representatives to advise the CSIO on adverse impacts of draft rules.
- Requires the CSIO to develop standards to evaluate a draft rule's impact on businesses.

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\* This version updates the effective date of the act.

- Authorizes the Joint Committee on Agency Rule Review (JCARR) to recommend invalidation of a draft rule on the grounds that the agency proposing the rule failed to demonstrate that the regulatory intent justifies the rule's adverse impact on businesses.
- Requires the CSIO to create a public comment system for rules it reviews.
- Requires state agencies to develop customer service performance standards for the agencies and their officers and employees.
- Requires the CSIO to annually report certain information to the Governor and members of the General Assembly.

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## CONTENT AND OPERATION

### Overview

The act eliminates a small business administrative rule review process that existed in former law and establishes a new process to evaluate whether administrative rules proposed by state agencies have an adverse impact on businesses and, if so, to reduce or eliminate that impact. The act creates a special office, the "Common Sense Initiative Office" (CSIO), within the Office of the Governor to evaluate administrative rules that may have an adverse impact on business.<sup>1</sup> The CSIO, advised by a nine-member council consisting of small business representatives appointed by the Governor, Speaker of the House, and President of the Senate, must establish a "business impact analysis instrument," which must be used to evaluate proposed rules or existing rules being evaluated during their five-year review.<sup>2</sup>

The CSIO must create a system through which any person can comment to the CSIO about the adverse impact on businesses a draft or current rule has or might have, or the adverse impact on businesses the implementation or administration of a current rule is having.<sup>3</sup> The General Assembly, Governor, and Lieutenant Governor would receive an annual report of the office's activities.<sup>4</sup> State agencies must develop customer

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<sup>1</sup> R.C. 121.24 (repealed by the act); Section 3.

<sup>2</sup> R.C. 107.53, 107.61, and 107.63; Section 6.

<sup>3</sup> R.C. 107.62.

<sup>4</sup> R.C. 107.55.

service standards for employees, and compliance would be evaluated as part of the state budget making process.<sup>5</sup>

### **Former small business rule review**

The formerly existing small business rule review process required an agency intending to adopt a rule that the agency believes will affect small businesses to prepare a rules summary and fiscal analysis of the proposed rule.<sup>6</sup> These were filed with the Office of Small Business in the Department of Development. The chairpersons of the General Assembly committees that handled small business issues could comment on the rule or call agency representatives to testify on the proposed rule. An agency could not file a finalized rule until it considered any comments, assessed the rule in light of the comments, and made any revisions the agency considered advisable. Further, each agency was required to review existing rules at least once every five years and consider and work to mitigate, if possible, a rule's adverse effect on small businesses. Agencies also had to file an annual report of its reviewed rules to the Governor and General Assembly. Finally, each agency had to designate an individual or office to comply with the review process and provide copies of documents to inquiring individuals. This process does not apply to emergency rules.

### **Applicability**

The act's new rule review process applies to any draft rule that has an "adverse impact on business," which is defined as a draft rule that has any of the following effects:

- Requires a license, permit, or any other prior authorization to engage in or operate a line of business;
- Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action, for failure to comply with the rule;
- Requires the report of information as a condition of compliance; or
- Requires other specific expenditures as a condition of compliance.<sup>7</sup>

A "draft rule" is a newly proposed amendment, adoption, or rescission of a rule that has not yet been filed for legislative review, and includes a proposed amendment,

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<sup>5</sup> R.C. 121.91.

<sup>6</sup> R.C. 111.15(F), 117.20, 119.03, 121.24, and 121.39.

<sup>7</sup> R.C. 107.52.

adoption, or rescission of a rule in both its original and any revised form, including a nonemergency rule that is proposed to replace an expiring or expired emergency rule, but not including a new emergency rule.<sup>8</sup> The agencies covered by this process are those that are required to file proposed rules for legislative review by JCARR.<sup>9</sup> The process does not apply to rules of the Governor, Lieutenant Governor, Auditor of State, Secretary of State, Treasurer of State, or Attorney General.

### **Common Sense Initiative Office**

The act creates the CSIO within the Office of the Governor, who is required to organize the office. The Governor is required to set up the CSIO and have it in operation as soon as practicable after the act's effective date but not later than August 15, 2011.<sup>10</sup> The electronic rule-filing system also is to be modified to connect the CSIO into the system as soon as practicable after that effective date but not later than August 15, 2011.<sup>11</sup> The Governor must appoint the professional, technical, and clerical personnel who are necessary for the work of the CSIO to be carried out efficiently and successfully. Employees would serve at the pleasure of the Governor and in the unclassified civil service. The Governor would provide the office with office space, furnishings, equipment, and resources as are necessary for its work to be carried out efficiently and successfully. The Governor may delegate the Governor's responsibilities regarding the CSIO as the Governor deems appropriate.<sup>12</sup> The CSIO must develop performance measures for evaluating its efficiency and effectiveness on a continuing basis and must prepare an annual summary of its self-evaluation.<sup>13</sup>

### **Small Business Advisory Council**

In addition to the CSIO, the act creates the Small Business Advisory Council within the Office of the Governor. The Council would advise the Governor, the Lieutenant Governor, and the CSIO on the adverse impact proposed rules might have on small businesses and must meet at least quarterly.

The Council consists of nine members: five appointed by the Governor, two by the President of the Senate, and two by the Speaker of the House. The appointing

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<sup>8</sup> R.C. 107.51 and 121.81(C).

<sup>9</sup> R.C. 121.81(A).

<sup>10</sup> Section 8.

<sup>11</sup> Section 7.

<sup>12</sup> R.C. 107.61.

<sup>13</sup> R.C. 107.55.

authorities must consult with each other and appoint only individuals who are representative of small businesses and make their appointments in such a manner that the membership of the Council is composed of representatives of small businesses of different sizes, in different lines of business, and from different parts of the state. Each member of the Council serves at the pleasure of the member's appointing authority. For the purposes of the advisory council, "small business" is an independently owned and operated for-profit or nonprofit business entity, including affiliates, that has fewer than 500 full-time employees or gross annual sales of less than \$6 million, and that has operations in Ohio.<sup>14</sup>

## **Business impact analysis instrument**

The act requires the CSIO to develop a "business impact analysis instrument" to be used to evaluate draft rules subject to the new business rule review process. The instrument must include the following:

--Standards encouraging agencies to draft proposed rules in such a manner that the rules will be "as easy to understand as their subject matter permits";

--Performance measures that can be applied to evaluate the likely efficiency and effectiveness of a draft rule in achieving its regulatory objectives;

--Standards that will promote transparency, predictability, consistency, and flexibility in the implementation and operation of a draft rule;

--Standards that will promote an "overall balance" in a draft rule between its regulatory objectives and the costs of compliance it imposes on regulated persons;

--Standards that require an agency to encourage businesses that might be adversely affected by a draft rule to participate in the rule-making process;

--Standards that will encourage businesses that are or may be adversely affected by a draft rule to offer advice and assistance to the agency when the draft rule has been adopted and is being implemented and administered;

--Standards for evaluating alternative means of regulation that might reduce or eliminate the adverse impact a draft rule might have on businesses (see below); and

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<sup>14</sup> R.C. 107.63.

--Any other standards or measures, or any other criteria, that will reduce or eliminate adverse impacts on businesses and foster improved regulation and economic development in the state.<sup>15</sup>

Alternative means of regulation include, and would not be limited to, less stringent compliance or reporting requirements, less stringent schedules or deadlines, consolidation or simplification of requirements, establishment of performance standards to replace operational standards, and exemption of businesses.

The instrument would not need to be adopted as a rule. The instrument must be published in the *Register of Ohio*. The first edition of the instrument must be published as soon as possible after the act's effective date but not later than October 3, 2011.<sup>16</sup>

### **Agency evaluation of draft rules for adverse impacts on businesses**

The act requires an agency, in the course of developing a draft rule that it intends to file for legislative review by JCARR, to do all of the following before filing the rule:<sup>17</sup>

--Evaluate the draft rule against the business impact analysis instrument. If, based on that evaluation, the draft rule will not have an adverse impact on businesses, the agency may proceed with the rule-filing process.

--Incorporate features into the draft rule that will eliminate or adequately reduce any adverse impact the draft rule might have on businesses if the initial evaluation determines that the draft rule will have an adverse impact on businesses.

--Prepare a "business impact analysis" that describes the agency's evaluation, identifies any features that were incorporated into the proposed rule as a result of the evaluation, and explains how those features (if any) eliminate or adequately reduce any adverse impact the rule might have on businesses.

--Transmit the draft rule and the business impact analysis electronically to the CSIO, which must post on its web site.

--Consider any recommendations made by the CSIO, and either incorporate into the draft rule any features the recommendations suggest will eliminate or reduce any adverse impact the rule might have on businesses, or document, in writing, the reasons those recommendations are not being incorporated.

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<sup>15</sup> R.C. 107.53.

<sup>16</sup> R.C. 107.53; Section 6.

<sup>17</sup> R.C. 121.82.

--Prepare a memorandum of response identifying any recommendations that were incorporated into the proposed rule, explaining how features that were incorporated eliminate or reduce any adverse impact the rule might have on businesses, and explaining why any features that were not incorporated were not incorporated.

When the CSIO receives an agency's draft rule and business impact analysis, it must evaluate them against the CSIO's business impact analysis instrument and any other relevant criteria. The CSIO may then prepare and transmit any recommendations to the agency on how the rule might be revised to eliminate or reduce any adverse impact on businesses. The CSIO must transmit any recommendations to the agency electronically.<sup>18</sup> If the CSIO does not respond to the agency, the CSIO is deemed to have not made any recommendations. The agency is prohibited from filing a draft rule for legislative review earlier than the 16th business day after transmitting the proposed rule and business impact analysis to the CSIO.<sup>19</sup>

When an agency files a proposed rule for legislative review by JCARR, it also must file a copy of its business impact analysis, a copy of any recommendations made by the CSIO, and a copy of any memorandum of response.<sup>20</sup> JCARR must reject a proposed rule if it determines that the rule might have an adverse impact on businesses and that the rule is not accompanied by the business impact analysis or if the analysis is not adequately prepared. When a proposed rule is rejected, it is as if the proposed rule had not been filed with JCARR, and JCARR must return the proposed rule to the agency.<sup>21</sup> JCARR's rejection of a rule for this reason does not preclude the agency from refileing the rule after complying with the new business rule review process.

## **Invalidation of rule**

The act adds a basis on which JCARR may recommend the invalidation of a proposed agency rule: that the agency failed to demonstrate that the regulatory intent of the rule justifies its adverse impact on businesses.<sup>22</sup> Under former law, there were five bases on which JCARR could recommend invalidation, including cases of conflicts with legislative intent or with another rule, if an agency exceeds its authority, if a summary or fiscal analysis is not prepared properly, or if the rule does not include the text of material incorporated by reference.

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<sup>18</sup> R.C. 107.54.

<sup>19</sup> R.C. 121.82.

<sup>20</sup> R.C. 111.15(D), 119.03(H), and 121.83(A).

<sup>21</sup> R.C. 121.83(B).

<sup>22</sup> R.C. 119.03(I)(1)(f).

Existing rules subject to continuing law's five-year rule review process must be evaluated for their adverse impact on businesses. JCARR may invalidate those rules if the adverse impact is not reduced or eliminated, in the same manner as for new proposed rules.<sup>23</sup>

### **Public comment on rules**

The act requires the CSIO to create a system through which any person can comment to the CSIO about the adverse impact on businesses of a draft rule, current rule, or the implementation or administration of a current rule.

The CSIO would prepare a plan for the comment system, and revise or replace the plan to improve the comment system in light of learning, experience, or technological development. This plan, at a minimum, would provide for accepting comments that are delivered to the CSIO, and to provide for establishing telephonic and Internet-based means whereby comments can be made. The CSIO's web site must provide notification to the public of any draft rule that may have an adverse impact on businesses, and must include copies of the rule and the business impact analysis. The CSIO's sole duty with regard to the comments is to forward comments to the state agency having jurisdiction over the rule.<sup>24</sup>

### **Annual report**

The act requires the CSIO, not later than February 1 each year, to prepare a report of its activities during the preceding calendar year, including all the following:

- A statement of the number of draft rules reviewed;
- A description of the recommendations made to agencies with regard to their draft rules;
- An assessment of the status of the recommendations made;
- An explanation of the performance measures developed to evaluate the efficiency and effectiveness of the office;
- An evaluation of the work of the office judged against the performance measures;
- Any other information the office believes will explain its work.

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<sup>23</sup> R.C. 119.032.

<sup>24</sup> R.C. 107.62.

The CSIO must transmit the report to the Governor, the Lieutenant Governor, the President and Minority Leader of the Senate, and the Speaker and Minority Leader of the House of Representatives.<sup>25</sup>

### **Transition to new business rule review process**

The act provides for transition to the new business rule review process. The former small business rule review process is superseded by the new business rule review process beginning January 1, 2012. The new business rule review process applies to the original and any revised version of a proposed rule that is filed with JCARR on or after January 1, 2012. The former small business rule review process applies to the original version of a proposed rule that is filed with JCARR before January 1, 2012, but the new business rule review process applies to any revised version of such a proposed rule filed on or after that date.<sup>26</sup>

Within 180 days after H.B. 1 takes effect (H.B. 1 provides for the creation of JobsOhio), the Governor, in consultation with the Director of Development, must determine whether the Office of Small Business within the Department of Development should be transferred to the CSIO or, alternatively, determine the best way to avoid duplication of services by those offices.<sup>27</sup>

The act makes several conforming amendments to adjust or remove statutory language that is affected by the repeal of the existing small business rule review process.<sup>28</sup>

### **Customer service performance standards for state agencies**

The act requires each state agency to develop customer service performance standards for each employee of the agency whose duties include a significant level of contact with the public. Standards pertaining to an agency's officers and employees must be based on the job descriptions of the positions they hold in the agency. The standards do not need to be adopted by rule. The act requires the standards to be reduced to writing. The standards must be incorporated into employee policy manuals, job descriptions, and employee performance evaluations.

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<sup>25</sup> R.C. 107.55.

<sup>26</sup> Section 5.

<sup>27</sup> Section 9.

<sup>28</sup> R.C. 103.0511, 111.15(D), (E), and (F), 117.20(A)(2), 119.03(B), (H), and (I)(1)(d), 121.39(D)(4), 122.08, 122.081, 122.94(B), and 1710.02(B).

The act requires each state agency and its officers and employees to comply with the customer service performance standards.<sup>29</sup> A state agency's compliance with the standards must be evaluated by the Director of Budget and Management and the committees of the Senate and House of Representatives having jurisdiction over the state operating budget, as part of the consideration of the state agency's biennial budget. If the evaluation is of the Office of Budget and Management, evaluation by the legislative committees is sufficient.

An officer's or employee's compliance with the standards are to be evaluated as part of the officer's or employee's periodic performance reviews. In addition, a state agency's and its officers' and employees' compliance with the standards may be evaluated as part of any performance audit of the state agency.

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## HISTORY

ACTION	DATE
Introduced	02-01-11
Reported, S. Gov't Oversight & Reform	02-23-11
Passed Senate (32-1)	02-23-11
Reported, H. Economic & Small Business Development	03-02-11
Passed House (81-14)	03-02-11
Senate concurred in House amendments (31-1)	03-02-11

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<sup>29</sup> R.C. 121.91.